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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD,

Plaintiff,

vs.

BRANDON PETERSON; LORI
HANKEL, personal representative of the
Estate of DANIEL TAYLOR,

Defendants.

No. CV-10-086-JLQ

DEFENDANTS' ANSWER AND
COUNTERCLAIM TO PLAINTIFF'S
COMPLAINT FOR DECLARATORY
JUDGMENT RE: INSURANCE
COVERAGE

Brandon Peterson, and Lori Hankel, Personal Representative of the Estate of
Daniel R. Taylor, answer the plaintiff's Complaint as follows:

DEFENDANTS' ANSWER AND COUNTERCLAIM TO
PLAINTIFF'S COMPLAINT FOR DECLARATORY
JUDGMENT RE: INSURANCE COVERAGE -- 1

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
1900 Bank of America Financial Center
601 West Riverside
Spokane, Washington 99201
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1 **JURISDICTION AND VENUE**

2 1. Admitted.

3 2. Admitted.

4 3. Admitted.

5 **THE PARTIES**

6
7 4. Defendants are without sufficient information to admit or deny, and
8 therefore deny.

9
10 5. Admitted.

11 6. Admitted.

12 **FACTUAL BACKGROUND**

13 **The Underlying Action.**

14
15 7. Defendants admit that defendant Lori Hankel filed a wrongful death action
16 against Brandon Peterson, Case No. 08202908-0, but deny that it was filed on January 28,
17 2008. The Complaint was filed on June 23, 2008.

18 8. The defendants admit that the initial Complaint contained the allegations
19 outlined, but to the extent plaintiff suggests "the Complaint" constituted the only claims
20 made by the Estate of Daniel R. Taylor, the defendants deny those allegations, and note
21 that an Amended Complaint for Wrongful Death was filed in Spokane County Superior
22 Court on October 15, 2008.
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24

1 9. Plaintiffs admit that the initial Complaint made these allegations, but to the
2 extent the "underlying Complaint" refers to the status of the action, defendants note that a
3 First Amended Complaint for Wrongful Death was filed October 15, 2008.
4

5 10. Defendants admit that the allegations outlined were made, but to the extent
6 the "underlying action" refers to the status of the case in Spokane County Superior Court,
7 defendants note that an Amended Complaint for Wrongful Death was filed on
8 October 15, 2008.
9

10 **The NFICH Auto Policy.**

11 11. Admitted.

12 12. Admitted.

13 13. Denied. The vehicle involved in the August 25, 2007 accident was
14 identified in the Amended Complaint as a vehicle owned by the Spokane House of Hose,
15 and thus a covered vehicle under the NFICH policy.
16

17 14. Denied. The Amended Complaint alleges Brandon Peterson was using the
18 vehicle with the permission of Lyle Peterson, an employee of Spokane House of Hose
19 who had been assigned to operate the vehicle by the Spokane House of Hose. Because
20 Lyle Peterson was an insured who gave permission to Brandon Peterson to operate the
21 vehicle, the Amended Complaint alleged facts and/or circumstances that Brandon
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24

Peterson could conceivably be an insured under the National Fire Insurance Company of Hartford ("NFICH") policy issued to the Spokane House of Hose.

Defendants Demands to NFICH and Settlement of the Underlying Action.

15. Admitted.

16. Defendants are without sufficient information to admit or deny this allegation because NFICH does not specifically identify the correspondence referred to by date, and/or other means, and therefore denies the same. Defendants admit that NFICH denied there was coverage under the policy.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

REQUEST FOR DECLARATORY RELIEF

21. Admitted.

22. Denied.

AFFIRMATIVE DEFENSES

By way of further answer and for affirmative defenses, the defendants allege as follows:

1 **First Affirmative Defense.**

2 That plaintiff has failed to state a cause of action upon which relief can be granted
3 as to these answering defendants.
4

5 **Second Affirmative Defense.**

6 That some or all of plaintiff's claims may be barred by the doctrine of waiver.

7 **Third Affirmative Defense.**

8 That some or all of plaintiff's claims may be barred by the doctrine of unclean
9 hands.
10

11 **Fourth Affirmative Defense.**

12 NFICH owed Brandon Peterson a duty to defend the action brought against him by
13 the Estate of Daniel R. Taylor as the allegations contained therein potentially triggered
14 coverage of the NFICH insurance policy, and NFICH owed a duty to indemnify because
15 the allegations made therein fell within the coverage provisions of the NFICH insurance
16 policy, and thus plaintiff may be equitably estopped from denying coverage by its failure
17 to exercise good faith and fair dealing with its insureds.
18

19 **Reservation.**

20
21 The answering defendants reserve the right to add additional affirmative defenses,
22 counterclaims, and crossclaims depending on the information developed during the
23 discovery process or trial.
24

COUNTERCLAIM

By way of further answer and for a counterclaim against the plaintiff, these answering defendants/counterclaimants allege as follows:

Parties.

1. At all times relevant hereto Brandon Peterson was a resident of Spokane County, Washington.

2. At all times relevant hereto defendant Lori Hankel, Personal Representative of the Estate of Daniel Taylor, was a resident of Spokane County, Washington.

3. At all times material hereto National Fire Insurance Company of Hartford ("NFICH") was an insurance company incorporated in Illinois with its principal place of business in Illinois; NFICH is authorized to do business in the State of Washington.

Jurisdiction and venue.

4. This court has jurisdiction of this matter under 28 U.S.C. §1332, because it is a civil action between citizens of different states in which the amount in controversy exceeds, exclusive of costs and interest, \$75,000.

5. Venue is proper in this district under 28 U.S.C. §1391(a)(1)(2)(3) because NFICH has transacted business in Spokane County and its breaches of its insurance contract and acts or omissions occurred in, and arose out of facts and circumstances

1 occurring in Spokane County, Washington, including but not limited to tenders of
2 defense and failures to appropriately respond to those tenders.

3 **Facts.**

4
5 6. NFICH insured the Spokane House of Hose under Policy No. 2092765496.
6 Said policy included a defense and indemnity obligation.

7 7. That policy covered vehicles owned by the Spokane House of Hose, and
8 defined an "insured" as:

9
10 a. You for any covered auto; and

11 b. Anyone else while using with your permission a covered auto
12 you own, hire or borrow.

13 8. Lyle Peterson was an employee of the Spokane House of Hose and was
14 provided and assigned a Dodge pickup motor vehicle for use and operation.

15 9. Lyle Peterson utilized the vehicle for personal use, including lending it to
16 family members with knowledge and permission, express or implied, of the Spokane
17 House of Hose. Spokane House of Hose was aware of and permitted such use by
18 Mr. Lyle Peterson, as well as other employees.

19 10. The Spokane House of Hose had a written company policy which provided
20 that company vehicles are provided for business utilization "unless prior permission is
21 received from management for outside of business use". It further provided that only the
22
23
24

1 assigned operators "should" operate the vehicle and "utilization of the vehicle by
2 non-employees and family members should be limited". It also provided that the
3 managers must be notified of personal trips longer than 50 miles.
4

5 11. The clear terms of the written policy permits family member use of the
6 Spokane House of Hose vehicles, although indicating it should be "limited", and indicates
7 permission "should" be obtained. Nothing in the written policy or the Spokane House of
8 Hose practices prohibited Lyle Peterson from loaning the company vehicle to his son
9 Brandon.
10

11 12. On August 25, 2007, Lyle Peterson gave permission to Brandon Peterson to
12 use the Dodge pickup owned by the Spokane House of Hose; Brandon Peterson operated
13 the motor vehicle with the knowledge and permission of Lyle Peterson.
14

15 13. Daniel R. Taylor was standing in the back of the motor vehicle being
16 operated by Brandon Peterson when Brandon Peterson accelerated ejecting Daniel Taylor
17 from the back of the motor vehicle causing him to strike his head on the pavement, and
18 die.
19

20 14. Brandon Peterson's negligence caused the death of Daniel R. Taylor via use
21 of the Dodge pickup owned by the Spokane House of Hose and insured by NFICH.
22

23 15. Lori Hankel filed a wrongful death action as Personal Representative of the
24 Estate of Daniel Taylor against Brandon Peterson ("underlying action"). Lori Hankel and

1 her counsel provided NFICH with a copy of the original Complaint in the underlying
2 action on or about August 1, 2008, and NFICH subsequently received the Amended
3 Complaint. On several occasions, counsel for Ms. Hankel informed NFICH he believed
4 there to be potential coverage.
5

6 16. Defendant Brandon Peterson through his counsel tendered the underlying
7 action to NFICH seeking coverage and defense on numerous occasions both verbally and
8 in writing.
9

10 17. NFICH repeatedly declined the tender, asserting that Brandon Peterson was
11 not an insured under the policy, asserting that the Spokane House of Hose had a "strict
12 policy" prohibiting employee use outside business purposes, despite the actual written
13 terms of the company policy. NFICH failed to thoroughly, accurately or reasonably
14 investigate or analyze Spokane House of Hose's actual policy on personal use and
15 permissive use by all employees, including Lyle Peterson.
16

17 18. NFICH also declined tender asserting that alcohol use precluded permissive
18 use, despite negligence claims which were asserted in the underlying action against
19 Brandon Peterson.
20

21 19. Brandon Peterson tendered the underlying suit to NFICH, however NFICH
22 did not accept the tender of defense, did not defend Mr. Peterson, did not indemnify
23 Mr. Peterson and failed to fully respond, despite allegations which under Washington law
24

1 triggered NFICH's duty to defend by including claims which could conceivably lead to
2 indemnification obligations under the policy. Woo v. Fireman's Fund Ins. Co., 150
3 Wn.App., 158, 208 P.3d 557 (2009).
4

5 20. Because the allegations of the underlying lawsuit, if proven, could impose
6 liability on Brandon Peterson within the coverage of the policies issued by NFICH,
7 because the duty to defend is broader than the duty to indemnify and because NFICH
8 could not conclusively rule coverage out, NFICH was obligated to defend and indemnify
9 Mr. Peterson from the claims asserted in the lawsuit.
10

11 21. On January 8, 2010, Brandon Peterson and Lori Hankel reached a settlement
12 on the underlying action stipulating to entry or judgment against Brandon Peterson in the
13 amount of \$737,000; that judgment was found reasonable by the court and was entered
14 on June 28, 2010.
15

16 22. In that settlement, Brandon Peterson assigned all claims with respect to all
17 insurance policies, benefits or proceeds to Lori Hankel as Personal Representative of the
18 Estate of Daniel Taylor.
19

20 **Causes of Action.**

21 23. Defendants/counterclaimants incorporate paragraphs 1 through 22 herein
22 applicable to all causes of action.
23
24

1 Breach of Contract.

2 24. NFICH has breached its contractual duty to defend and indemnify Brandon
3 Peterson in the underlying lawsuit. NFICH's breach of its insurance contract had the
4 direct and proximate cause of depriving Brandon Peterson of the benefits of insurance
5 coverage under the policy, including lack of defense or indemnification in the underlying
6 suit.
7

8 Breach of good faith and fair dealing.

9
10 25. The business of insurance is one that affects the public intent, and NFICH
11 owed a duty to conduct itself in good faith.

12 26. NFICH has breached its obligation of good faith and fair dealing under
13 RCW 48.01.010 and the Washington Administrative Code, including, without limitation:
14 (1) failing to make a thorough investigation of the facts and applicable law in order to
15 develop an intelligent and good faith opinion regarding the claims in the underlying suit
16 and Brandon Peterson's entitlement to coverage; (2) engaging in acts that demonstrated a
17 greater concern for its monetary interests than for the insured's financial risk; (3) not
18 attempting in good faith to effectuate the prompt, fair and equitable settlement of claims
19 in which liability had become reasonably clear; (4) unreasonably failing to provide
20 defense and indemnification to its insured; and (5) forcing its insured to engage in
21 litigation to obtain the coverage due under the insurance policy.
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23
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1 27. As a direct and proximate cause of these breaches,
2 defendants/counterclaimants suffered harm in an amount to be proven at trial.

3 Breach of Insurance Fair Conduct Act.
4

5 28. NFICH has violated Washington's Insurance Fair Conduct Act,
6 RCW 48.30.015, by unreasonably denying a claim for coverage or payment of benefits
7 and is liable for actual damages in an amount to be proven at trial, treble damages up to
8 three times the actual damages, plus attorneys fees, costs, and expenses.

9
10 29. Pursuant to RCW 48.30.015, defendants/counterclaimants provided NFICH
11 with 20 days prior written notice of its intent to file this action, on or about July 7, 2010;
12 NFICH did not resolve the claims within 20 days nor at any time since that period has
13 elapsed.

14 Consumer Protection Act.
15

16 30. NFICH engaged in numerous unfair and deceptive acts and practices
17 prohibited by Washington's Consumer Protection Act, RCW 19.86 et seq., the
18 Washington Insurance Code, and the Washington Administrative Code, including,
19 without limitation, (1) failing to make a thorough investigation of the facts and applicable
20 law in order to develop an intelligent and good faith opinion regarding the claims in the
21 underlying suit and Brandon Peterson's entitlement to coverage; (2) engaging in acts that
22 demonstrated a greater concern for its monetary interests than for the insured's financial
23
24

1 risk; (3) not attempting in good faith to effectuate the prompt, fair and equitable
2 settlement of claims in which liability had become reasonably clear; (4) unreasonably
3 failing to provide defense and indemnification to its insured; and (5) forcing its insured to
4 engage in litigation to obtain the coverage due under the insurance policy.
5

6 31. NFICH's unfair and deceptive acts occurred in trade or commerce, impact
7 the public interest and have caused injury to defendants/counterclaimants' business or
8 property in violation of the Consumer Protection Act.
9

10 32. As a result of the violations, NFICH is liable for the full amount of the
11 underlying settlement, interest, costs, attorney's fees, and for treble damages of up to
12 \$10,000 for each and every CPA violation.
13

14 Estoppel to deny coverage.

15 33. By its conduct, and breaches of its obligations and duties of good faith,
16 NFICH is estopped from denying coverage and its duty to indemnify Peterson under the
17 doctrine announced in Kirk v. Mount Airy Ins. Co., 134 Wn.2d 558, 951 P.2d 1124
18 (1998), and is liable to the Estate of Daniel Taylor, as assignee, for the full amount of the
19 settlement, plus fees and costs, including attorney's fees.
20

21 Declaratory relief.

22 34. An actual controversy exists between NFICH and counterclaimants as to the
23 rights, duties and obligations of the parties under the policy, especially as to those rights,
24

1 duties, and obligations relate to the duty to defend and indemnify Mr. Peterson.
2 Counterclaimants are entitled to a declaratory judgment from this court setting forth and
3 decreeing the respective rights, duties and obligations of the parties under the policy
4 issued by NFICH.
5

6 **PRAYER FOR RELIEF**

7 WHEREFORE, defendants/counterclaimants pray for relief against the other party
8 as follows:
9

10 1. For money damages in an amount to be proven at trial, including but not
11 limited to the full amount of the settlement/judgment reached in the lawsuit between
12 Brandon Peterson and Lori Hankel, and all attorneys fees, costs, and expenses incurred in
13 connection therewith.
14

15 2. For declaratory relief consistent with the pleadings herein, including but not
16 limited to declarations that (a) NFICH breached their contractual duty to defend and/or
17 indemnify their insured; (b) NFICH breached their obligations of good faith and fair
18 dealing; (c) NFICH violated Washington's Consumer Protection Act; (d) NFICH
19 breached Washington's Insurance Fair Conduct Act; and (e) NFICH is estopped from
20 denying coverage to indemnify counterclaimants.
21

22 3. For pre-judgment interest.
23
24

4. For punitive damages, attorneys fees, costs and expenses under Washington's Consumer Protection Act, and Washington's Insurance Fair Conduct Act.

5. For plaintiff's costs and disbursement including actual and reasonable attorneys fees under Olympic Steamship, Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991).

6. For such other and further relief as the court deem just and equitable.

DATED this 26th day of August, 2010.

s/Patrick J. Cronin, WSBA No. 28254
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DEFENDANTS' ANSWER AND COUNTERCLAIM TO
PLAINTIFF'S COMPLAINT FOR DECLARATORY
JUDGMENT RE: INSURANCE COVERAGE -- 15

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1 I hereby certify that on August 26th, 2010, I electronically filed the foregoing with
2 the Clerk of the Court using the CM/ECF System which will send notification of such
3 filing to the following:

4 Michael E. Ricketts
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24 DEFENDANTS' ANSWER AND COUNTERCLAIM TO
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